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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 465

IRA S. BUSHEY & SONS, INC., Employer and THE STATE INSURANCE FUND, Insurance Carrier,
Petitioners,

v.

FRANK A. CARDILLO, Deputy Commissioner, Second Compensation District, THORLEIF JOHANSEN, Claimant, AMERICAN POLICYHOLDERS' INSURANCE COMPANY and/or AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and HARTFORD ACCIDENT & INDEMNITY COMPANY, Insurance Carriers,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

FRANK A. CARDILLO, Deputy Commissioner, Second Compensation District, THORLEIF JOHANSEN, Claimant, AMERICAN POLICYHOLDERS' INSURANCE COMPANY and/or AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and HARTFORD ACCIDENT & INDEMNITY COMPANY, Insurance Carriers,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The respondent prays that the petition for a writ of certiorari to review the mandate of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 19, 1955 be denied.

Statement of Facts

On September 16, 1953 and for 11 years prior thereto claimant, Thorleif Johansen was in the continuous employ of the employer, Ira S. Bushey & Sons, Inc. at Brooklyn, New York in the State of New York, in the Second Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. The liability of the employer, Ira S. Bushey & Sons, Inc. for the payment of compensation under the said Act was insured by three successive insurance carriers:

(1) American Policyholders' Insurance Company and/or American Mutual Liability Insurance Company—June 8, 1927 to June 1, 1953.

(2) Hartford Accident and Indemnity Company—June 1, 1953 to September 9, 1953.

(3) The State Insurance Fund—September 9, 1953 to September 16, 1953.

During the said period of continuous employment with the employer herein claimant performed service as an ironworker, shipfitter and ship carpenter in the repair of vessels and was constantly exposed to loud and injurious noises; that as a result of such employment and exposure, claimant sustained injury, occupational in character, consisting of permanent binaural impairment of hearing; that the said injury arose naturally out of such employment, that the claim for compensation was timely filed within one year from the date when claimant first had knowledge of a permanent hearing loss due to his employment, that the claimant's average annual earnings at the

time of his injury exceeded $2730.00; and that nothing had been paid to the claimant as compensation. Accordingly, the Deputy Commissioner concluded that Ira S. Bushey & Sons, Inc., the last employer, in whose employment claimant was continuously exposed for eleven years, was liable for payment of compensation; that the insurance carriers who successively covered such liability of the employer during the period of claimant's last employment were jointly, equally and severally responsible for the discharge of the duties and obligations of the last employer in respect of such liability; and that, as a result of the injury sustained, claimant had suffered permanent partial disability equivalent to 13.8% binaural loss of hearing compensable under the Longshoremen's and Harbor Workers' Act at the maximum rate of $35.00 a week for 27.6 weeks, or a total amount of $966.00.

The employer and the three insurance companies involved appealed to the District Court from the Deputy Commissioner's award. The District Court granted defendants' motion for summary judgment dismissing the complaint. Thereafter the employer and the three insurance companies appealed to the U. S. Court of Appeals for the Second Circuit. By unanimous decision entered on July 19, 1955 the U. S. Court of Appeals for the Second Circuit affirmed the order of the District Court but remanded to that Court with directions to fix the liability not only on the last employer but upon the last carrier. The only petitioner herein is the last carrier, The State Insurance Fund. *The other insurance carriers, the American Policyholders' Insurance Company and/or American Mutual Liability Insurance Company and*

Hartford Accident & Indemnity Company the claimant and the United States Government have accepted the decision of the U. S. Court of Appeals.

Questions Presented

The petitioner raises three questions before this Court.

1. Where there admittedly was no impairment of wage earning capacity, was the award to claimant Johansen for a partial loss of hearing contrary to law as enacted by the Congress and therefore illegal and void?
2. Where the only provision relating to occupational disease is contained in the definition of injury so as to include occupational disease, thus leaving it entirely to the Deputy Commissioners to determine what an occupational disease is; when it arises; in whose employ the disablement occurred, without any statutory rules or guides of conduct is an unlawful delegation of legislative power.
3. Did the decision of the court below holding liable the carrier who last insured the "liable" employer to the exclusion of two other carriers for the same employer deprive said last carrier of its constitutional rights under its contract of insurance in direct violation of the provisions of the Constitution of the United States?

This respondent will answer each question in sequence.

POINT I

Since occupational loss of hearing is a scheduled injury, loss of wage earning capacity and its extent are conclusively established and therefore the award to claimant Thorleif Johansen was in accordance with law.

The salient sections of the Longshoremen's and Harbor Workers' Act (hereinafter called the Longshoremen's Act) relative to the above are 33 U. S. C. A. Section 902(2), 33 U. S. C. A. Section 908(c) 1-20, 33 U. S. C. A. Section 908(c) 13, 33 U. S. C. A. Section 908(c) 21.

Injury as defined in the Longshoremen's Act includes both accidental injury or death arising out of and in the course of employment and such occupational disease or infection as arises naturally out of such employment. 33 U. S. C. A. Section 902(2).

Section 908 concerns itself with compensation to be paid to a claimant for disability. Section 908(c) 1-20 states the type of payment to be awarded to the claimant for scheduled injuries. Section 908(c) 1-20 are concerned with awards for measurable injuries such as arms, legs, ears, eyes, etc. Nowhere in this group is wage earning impairment mentioned. In Section 908(c) 13 is found provision for compensation to be paid for loss of hearing.

Section 908(c) 21 concerns itself with non-scheduled awards and it is there that wage impairment must be proven and is not conclusively presumed. The type of injury that arises under Paragraph 21

are head, back injuries, etc. and other non-measurable injuries.

Petitioner concedes that loss of hearing is a scheduled injury (Page 6 of petition). Its only contention is that since Section 902 Subdivision 10 defines disability as meaning "incapacity because of the injury to earn the wages which the employee was receiving at the time of the injury in the same or other employment", it is necessary to prove actual loss of earnings in scheduled cases.

The definition of disability must be read in conjunction with Section 908(c) 1-20. There is no clearer expression of legislative intent than the language found therein and one can only conclude that loss of wage earning capacity and its extent have been legislatively fixed in the Statute and need not be established. See "Workmen's Compensation Law", by Larson, Vol. 2, sec. 58.10. *H. K. Toy & Novelty Co.* v. *Richards,* 68 Ind. App. 653, 117 N. E. 260 (1917); *Franko* v. *William Schollhorn Co.,* 93 Conn. 13, 104 A. 485 (1918); *Lents* v. *Lucci,* 275 Pa. 217, 119 A. 132 (1922), 24 A. L. R. 1462; *Dombrozzi* v. *E. Gross & Co.,* 112 Conn. 627, 1953 A. 780 (1931); *Catlett* v. *Chattanooga Handle Co.,* 165 Tenn. 343, 55 S. W. 2d 257 (1933); *Ossie* v. *Verde Central Mines,* 46 Ariz. 176, 49 P. 2d 396 (1935); *New Jellico Coal Co.* v. *Gilbruth,* 187 Tenn. 606, 216 S. W. 2d 329 (1949); *Williams* v. *Ind. Comm.,* 73 Ariz. 57, 237 P. 2d 471 (1952); *Nicely* v. *Virginia E. & P. Co.,* 195 Va. 819, 80 S. E. 2d 529 (1954); *Green Bay D. F. Co.* v. *Ind. Comm.,* 265 Wis. 38, 60 N. W. 2d 409, rehearing denied *Green Bay D. F. Co.* v. *Wojcik,* 265 Wis. 38, 61 N. W. 2d 847 (1954); *Rowe* v. *McGovern,*

254 App. Div. 432, 5 N. Y. S. 2d 626 (1938); *Slawinski* v. *Williams,* 273 App. Div. 826, 76 N. Y. S. 2d 888 (1948), Aff'd 298 N. Y. 546, 81 N. E. 2d 93 (1948).

Judge Medina in the instant case in writing the decision for a unanimous court in the U. S. Court of Appeals states:

> "having concluded that the statutory schedules apply 'to injuries' resulting from occupational disease it remains for us to point out only that in the case of schedule losses, the Congress has determined that a loss of wage earning capacity and its extent are conclusively established when one of the enumerated physical impairments is proven to have arisen out of the employment."

Judge Medina also distinguished the case of *Iacone* v. *Cardillo,* 208 F. 2d 696 (C. A. 2, 1953) cited by the petitioner in support of its impairment of wage concept. The Iacone case was one wherein a claim was made for an award because of an eye injury. The claimant had a complete loss of use of the eye prior to the industrial accident upon which the claim was based. The Court stated that the schedule award provisions did not contemplate payment of compensation for a pre-existing sightless eye. This is not the claim in the instant case nor does the petitioner allege any pre-existing loss of hearing of the nature found in the Iacone case. It is significant to note that Judge Medina wrote the decision in both the Iacone case and the instant case.

Therefore, since impairment of wage earning is conclusively presumed in a scheduled injury and since

loss of hearing is one of the scheduled injuries, U. S. C. A. Section 908(c) 13, the Deputy Commissioner's award was made in accordance with Law.

POINT II

There is no delegation of legislative power within the framework of the Longshoremen's and Harbor Workers' Compensation Act.

Petitioner contends that since the only provision relating to occupational disease is in the definition of injury the legislature has delegated to the administrator the determination as to what is an occupational disease, when it arises and in whose employ the disablement occurred. Nothing is further from the facts.

It has long been a recognized fact that hearing can be impaired in one's occupation by exposure to loud and continuous noises over a period of time. Industrial Hygiene, Lindsay and Goldberg (1937) page 577; Trauma, Disease, Compensation, Frazier (1930).

By decision the Federal Courts have accepted occupational diseases as those which result from the nature of the employment. In *Chausse* v. *Lowe,* 35 F. Supp. 1011 (N. Y. 1938) the District Court adopted the definition of occupational disease set out in *Goldberg* v. *954 March Corp.,* 276 N. Y. 313, 12 N. E. 2d 311, 313 (1938), as follows:

> "Thus an occupational disease is one which results from the nature of the employment, and by nature is meant, not those conditions brought about by the failure of the employer to furnish a

> safe place to work, but conditions to which all employees of a class are subject, and which produces the disease as a natural incident of a particular occupation, and attached to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of the hazard attending employment in general."

See also *McNeely* v. *Sheppard,* 89 F. 2d 956 (C. A. 5, 1937), *Grain Handling Co.* v. *Sweeney,* 102 F. 2d 464 (C. A. 2, 1939).

Impairment of hearing like other occupational diseases is a cumulative injury and it would be impossible for the legislature to enact a rule wherein a fixed date for the arising of said disease would be established. The Supreme Court showed an awareness of the very problem in the case of *Urie* v. *Thompson,* 337 U. S. 163. In the *Urie* case, the United States Supreme Court stated:

> "* * * The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie should have known he had silicosis at any earlier date. 'It follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be "injured" only when the accumulated effects of the deleterious substance manifest themselves * * *' Associated Indemnity Corp. v. Industrial Accident Commission, 124 Cal. App. 378, 381, 12 P. 2d 1075, 1076."

Another difficulty which confronted the courts has been the question of in whose employ the disablement occurred. Due to the nature of an occupational disease, the courts have held that the injury occurs in the employ where the employee is working at the time he becomes disabled. *Urie* v. *Thompson,* 337 U. S. 163; *North End Foundry Co.* v. *Ind. Comm.,* 217 Wis. 363, 258 N. W. 439, 443 (1935); *Zurich General Accident & Liability Ins.* v. *Ind. Comm.,* 203 Wis. 135, 233 N. W. 772 (1930); *Gillespie & Sons* v. *Johnson,* 167 Okla. 83, 27 P. 2d 814 (1933); *Bergeron's Case,* 243 Mass. 366, 137 N. E. 739 (1933); *Textileather Corp.* v. *Great American Indemnity Co.,* 108 N. J. Law 121, 156 A. 840 (1931).

The Legislature in enacting the Longshoremen's Act was fully cognizant that in occupational disease cases the employer at the time of disablement would bear the entire expense for the injury. See Hearing of Committee on the Judiciary of the House of Representatives, 69th Congress, First Session on H. R. 9498, which was the House equivalent of S. 3170, which ultimately became the Longshoremen's Act, with particular attention to pp. 74 and 115 of said hearings. Thus it can be seen that both the legislature and the employer were cognizant at the inception of the Act that the employer in the last employment when the disablement occurred would be solely liable for compensation to the injured employee.

In the instant case, the record shows that the claimant was exposed to injurious industrial noises while employed by Ira S. Bushey & Sons, Inc. as a shipfitter and carpenter from 1930 to 1940, and from 1942 to 1953 (transcript 12 etc. T. 12). Around December 1952 which would be during the last period of em-

ployment the claimant noticed some buzzing and ringing in his ears and in January or February 1953 he noticed a loss of hearing (T. 18). On September 16, 1953 when the condition persisted the claimant went to a doctor for examination (T. 19). It was then for the first time he knew that his loss of hearing was due to his employment (T. 21). All the doctors who examined the claimant for the insurance carriers and otherwise testified that there was a loss of hearing and that it was due to claimant's employment (see Exhibit B) (T. 127, 128). Exhibit 1 (T. 130, 131, 132) the loss is permanent (T. 69, 137).

The Deputy Commissioner when he made his award based it on the above testimony both lay and medical. It is evident therefore, that the award was not made by arbitary action on the part of the Deputy Commissioner.

The legislature has provided ample protection against injustice in the Act by permitting an injured party to avail himself of the Courts if a compensation order is not in accordance with Law (see 33 U. S. C. 921B.)

From the above it is obvious that from the nature of an occupational disease it would have been impossible for the legislature to enact any additional statutory rules than presently are found in the Act itself. The Deputy Commissioner acted within the framework of the Longshoremen's Act in the administration of it and there is no evidence whatsoever of any delegation of legislative power.

POINT III

Constitutional questions not raised in the lower courts cannot be raised for the first time in the United States Supreme Court.

The petitioner is now contending for the first time that its property is being taken away without due process of law and therefore, in violation of Amendment V of the Constitution. The petitioner did not raise this issue before the Deputy Commissioner nor before the trial or Appellate Courts.

There is no clearer rule of law than the proposition that the Supreme Court will not consider a constitutional question raised for the first time on appeal. *Western Union Telegraph Co.* v. *Winland,* 182 F. 493, 104 C. C. A. 439 (1910); *Wabash Ry. Co.* v. *City of St. Louis, Mo.,* 54 S. Ct. 88, 290 U. S. 668 (1933); *Polizzi* v. *Cowles Magazines, Inc.,* 73 S. Ct. 900, 345 U. S. 663; *Shelley* v. *Kraemer,* 68 S. Ct. 836, 334 U. S. 1; *McGhee* v. *Sipes,* 68 S. Ct. 836, 334 U. S. 1; *Keyes* v. *Madsen,* 179 F. 2d 40, 86 U. S. App. D. C. 24, certiorari denied, 70 S. Ct. 628, 339 U. S. 928.

Thus, since the petitioner cannot raise a constitutional question before this Court for the first time, the discussion in petitioner's brief concerning this question must be completely disregarded (Pages 14-19 of petitioner's brief).

Conclusion

The decision of the U. S. Court of Appeals written by Judge Medina in the instant case and made a part of petitioner's appendix answers logically and succinctly the relevant questions raised by the petitioner.

It is respectfully submitted therefore, that this petition should be denied.

Respectfully submitted,

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LEONARD TAUBENBLATT
Of Counsel

November 9, 1955.